No. 16-107

In The
Supreme Court of the United States

OXY USA INC.,

Petitioner,

v.

DAVID SCHELL, ET AL., on behalf of himself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court has held that vacatur is inappropriate when the appellant knowingly and voluntarily chooses conduct that moots a case over conduct that preserves the right to appeal. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994); *Alvarez v. Smith*, 558 U.S. 87 (2009). One small exception may exist, that is when a compelling public interest is shown.

The question presented is: When an appellant knowingly chooses to moot its own appeal and no public interest factor is at stake, whether vacatur should be denied, as the Tenth Circuit held, or whether federal appellate courts must divine the subjective motivations behind the case-mooting conduct and make factual findings about whether those motivations were a "significant factor" in the case-mooting conduct.

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INTRODUCTION

Because there is no circuit split, the Tenth Circuit (in line with all other circuits) followed *Bancorp* and *Alvarez* on the law on vacatur. *Bancorp* made clear that the principal factor in deciding vacatur is whether the case-mooting conduct was voluntary or happenstance. If the conduct was happenstance, vacatur is fair. But if the case-mooting conduct was voluntary, vacatur is unfair because the appellant – here, OXY – consciously made the decision that mooted the case.

In this case, OXY wants to "eat its cake and have it too": it wants to keep the windfall of its $1.4 billion deal with Merit and at the same time erase its district court loss.[1] The Tenth Circuit held, based on the evidence provided to it (or, more accurately, kept from it, as OXY never produced in the appellate record the key evidence, *i.e.*, the contract between it and Merit allegedly evidencing the sale of assets to Merit), that the equities did not justify a vacatur. The $1.4 billion sale was not "happenstance"; it was voluntary and knowing, and no "public interest" factor was even argued, let alone substantiated with evidence. OXY invites this Court to wade into the factual quagmire of weighing the subjective motivations of business deals by recognizing out of thin air a "significant factor" test. The Court should decline OXY's invitation as a path to bad law paved with expensive and unnecessary satellite

[1] The "eat your cake and have it too" concept comes from *Mfrs. Hanover Tr. Co. v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993), discussed *infra* at 5.

litigation. For numerous reasons, this case is not worthy of a writ of certiorari.

STATEMENT

The most detailed statement of facts is found in the district court opinion, which addressed the issues on the merits, App. 74a-114a, not the Tenth Circuit opinions, which generally did not. App. 2a (acknowledging its opinion is "brief in [its] recounting of the factual and legal background" given its determination that OXY's sale mooted the appeal of the declaratory judgment entered against OXY). Most of OXY's shading of the record is irrelevant to the vacatur issue before this Court, but pursuant to Supreme Court Rule 15.2, Respondents correct the factual Statement by Petitioner OXY as follows:

1. OXY sent the letters threatening to cut off the house gas to all, not just some, of the free gas users. OXY cites to App. 3a, but that page nowhere says "some." *See* App. 78a.

2. Respondents did not allege, and the district court did not hold, that OXY had to supply the house gas from a source other than the well on the landowner's property. Pet. 6, ¶¶ a & b. "It is important to note that the court is not requiring defendant to place compressors on individual wells or to treat the gas to eliminate the high H2S problem. . . . In fact, the

court is not directing defendant to do anything other than to provide free, useable gas to plaintiffs as required under the leases. How it does so is not the court's concern at this stage. At least one court has, however, allowed a lessee to provide free gas from other sources as a way of meeting the free gas obligation." App. 99a (citation omitted).

3. OXY did argue repeatedly and often that the case was not moot. Pet. 7-8. But none of OXY's excuses held water. App. 5a-11a. Why OXY includes these arguments in its Statement when it does not dispute the issue before this Court is unknown.

4. Although OXY claims the Tenth Circuit "panel did not instruct [OXY's Counsel] to [provide the Merit sale contract]," no record citation is provided for that assertion. The Tenth Circuit plainly asked for it, but did not order it. App. 23a ("Despite repeated questions at oral argument, OXY never voluntarily offered for inclusion in the record the sales contract, or a part thereof.") To this day, OXY has never provided the contract to any court or to Respondents. So the contract is not in the record and can have no evidentiary value.

5. Merit did move to intervene *after* the oral argument, Pet. 9, when it was apparent that the Tenth Circuit believed the case was moot. But, contrary to OXY's suggestion, Merit never admitted or even

claimed to be bound by the declaratory judgment against OXY, and Merit's intervention was not just tossed aside as untimely (though it was that too). App. 11a n.4.

6. The remaining selective quoting and twisting of the Tenth Circuit's opinions should not be part of the facts, but part of the Argument. So they are addressed below.

The salient facts for OXY's petition for certiorari are:

1. After the district court judgment and before the Tenth Circuit judgment, OXY voluntarily and consciously sold all of its Kansas assets to Merit (the "Merit Sale Contract"), including the leases subject to the declaratory judgment action, thereby mooting the case. App. 5a-11a.

2. OXY never provided the Merit Sale Contract to the Tenth Circuit despite many opportunities before, during, and after the Tenth Circuit oral argument. App. 23a & n.8.

3. OXY provided no "public interest" evidence to support vacatur. *See* absence in record.

4. OXY provided no evidence at all about its various motivations for the sale of all of the Kansas assets, including all of the

leases, at any time before the appeal in this case was over. *See* absence in record.

REASONS FOR DENYING THE PETITION

A. The Tenth Circuit Followed *Bancorp* and *Alvarez* Because OXY's $1.4 Billion Sale Of All Its Kansas Leases Was Knowing And Voluntary Case-Mooting Conduct

While there are exceptions, the rule on vacatur is simple: equity and fairness dictate that courts "generally act to prevent a party from taking advantage of mootness that the party caused." App. 13a. OXY hopes to create an exception that swallows the rule so it can take advantage of the mootness it caused and escape a declaratory judgment entered against it.

1. *Bancorp* Established Voluntary Conduct As The Principal Equity Factor

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), vacatur was denied because the appellant (the losing party below) voluntarily settled the case, thereby mooting it. In so doing, the appellant effectively forfeited the right to a vacatur of the district court judgment. *Id*. at 21. The Court reasoned that because the mootness did not result from "the vagaries of circumstance," but from the appellant's "*voluntary action*," the lower court judgment should remain. *Id.* at 24-25 (the appellant had "*caused* the mootness by *voluntary action*") (emphasis added).

In contrast, vacatur is allowed when "happenstance," rather than the voluntary action, causes the mootness. *Id*. at 25. Here, OXY's decision to sell its leases for $1.4 billion was not happenstance. It was initiated and agreed to by OXY. Thus, applied here, *Bancorp* makes vacatur improper.

In determining vacatur, *Bancorp* made voluntary conduct the principal factor. 513 U.S. at 24 ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action.") (citations omitted). This principal factor still applies today across all settings.[2] Its simplicity in application and fairness were obvious to courts even before this Court decided *Bancorp*:

> If we were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow the party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won.

Mfrs. Hanover Tr. Co. v. Yanakas, 11 F.3d 381, 383 (2d Cir. 1993). This "eat your cake and have it too" approach is what OXY advocates for itself, and what the

[2] Some circuits initially limited *Bancorp* to its settlement context. But *Alvarez* clarified the broader applicability of *Bancorp*. Even so, OXY relies on *dicta* from some of pre-*Alvarez* cases to manufacture its claim of a "circuit conflict." Pet. 17 (citing *Am. Family Life Assur. Co. v. F.C.C.*, 129 F.3d 625, 630 (D.C. Cir. 1997) and *Humane Society v. Kempthorne*, 527 F.3d 181, 185 (D.C. Cir. 2008)).

Tenth Circuit properly rejected. App. 22a ("To act otherwise would permit OXY to benefit from its voluntary act by wiping away a loss.").

2. *Alvarez* Clarified That The Voluntary Conduct Had To Be Knowing To Moot The Appeal

In *Alvarez v. Smith*, 558 U.S. 87 (2009), this Court faced voluntary case-mooting conduct by the government. But, as often happens with governmental entities, one hand of the government did not know what the other was doing. Given this unusual context, this Court examined whether the voluntary conduct was knowingly case-mooting. In other words, did the appellee make a conscious choice between the appeal and the case-mooting conduct?[3] This Court found no such

[3] Both before and after *Alvarez*, courts have examined the voluntary conduct of various governmental agencies to determine if the case-mooting conduct was more akin to happenstance. *Russman v. Bd. of Educ. of Enlarged City Sch. Dist.*, 260 F.3d 114, 122-23 (2d Cir. 2001); *Khodara Envtl., Inc. ex rel. Eagle Envtl., L.P. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001); *Lightner ex rel. NLRB v. 1621 Route 22 W. Operating Co.*, 729 F.3d 235 (3d Cir. 2013); *McClendon v. City of Albuquerque*, 100 F.3d 863 (10th Cir. 1996); *Wyoming v. U.S. Dept. of Agric.*, 414 F.3d 1207 (10th Cir. 2005); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010); *National Black Police Ass'n v. D.C.*, 108 F.3d 346, 351 (D.C. Cir. 1997); *Am. Family Life Assur. Co. v. F.C.C.*, 129 F.3d 625 (D.C. Cir. 1997). *But see 19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 76 F.3d 1142 (10th Cir. 1996) (denying vacatur on equitable grounds), and App. 15a-20a (comparing and explaining the equitable differences between cases vacating and those not).

knowing election occurred, so the case-mooting conduct "more closely resemble[d] mootness through 'happenstance.'" *Id*. at 94. Of course, that situation does not apply here. When OXY sold all of its Kansas assets, OXY (which is not a government entity) knew that it would moot its appeal of the declaratory judgment imposed against it in Kansas.

OXY relies heavily on *Russman* (a pre-*Alvarez* case), where the parents of a mentally retarded student brought an individual lawsuit against the school district, challenging the district's refusal to fund onsite special education services for the student at a private parochial school. When the student essentially graduated from the public school, the parents' appeal was mooted. But, unlike OXY here, the parents took no voluntary action to cause the mootness of their appeal. Recognizing that "the appellant has no automatic right to vacatur" under *Bancorp*, and following a line of cases in which a student "has simply graduated from the defendant institution after the district court's judgment" and "in which we usually have vacated the district court judgment," the Second Circuit vacated the district court judgment in favor of the school district and against the parents. 260 F.3d at 121-22. *Russman* actually confirms the approach later taken by this Court in *Alvarez* and which the Tenth Circuit followed:

OXY's attempt to rely on the government entity cases is misplaced because OXY is a publicly-traded corporation, not a governmental entity.

> For an appellant's conduct to constitute "forfeiture" of the benefit of vacatur, *see U.S. Bancorp*, 513 U.S. at 25, we believe he must have intended that the appeal become moot, either in the sense that mootness was his purpose or *that he knew or should have known that his conduct was substantially likely to moot the appeal*.

Id. at 122 (emphasis added). *Accord Lightner*, 729 F.3d at 238 ("conscious choice"). Here, OXY knew (or certainly should have known) that selling all of its Kansas assets would moot its appeal. It was OXY's conscious choice to take the $1.4 billion deal.

When compared with the declaratory judgment requiring OXY to provide free, useable house gas, the $1.4 billion in OXY's coffers from the sale of assets to Merit should have ended the equitable inquiry. But OXY continued to press the issue. The Tenth Circuit gave OXY an unprecedented "second bite at the apple" by allowing OXY to show some "other compelling equitable reason demonstrat[ing] that vacatur is appropriate." App. 21a. There is no authority from this Court that when the principal factor, voluntary conduct, is undisputed, that some other non-principal but compelling equitable reason can overcome it.[4] But none of this

[4] Under this compelling non-principal factor test, the Tenth Circuit has in the past looked at whether the government entity's voluntary case-mooting conduct was "responsible governmental conduct to be commended." App. 25a (quoting *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996)). But OXY is not the government, and, as the Tenth Circuit stated, "OXY's sale was certainly not anything to condemn, but we have no reason to

matters because OXY did not accept the Tenth Circuit's offer to provide some other compelling equitable reason warranting vacatur. Instead OXY stonewalled and never presented the Merit Sale Contract to the Court or Respondents. OXY presented no compelling evidence or reason of any kind – just argument that the law should lower the bar from a multi-factorial equitable analysis to a single factor analysis of the party's subjective motivation behind the knowing and voluntary conduct, *i.e.*, an assessment of whether the appeal-mooting conduct is or is not related to the litigation that resulted in the declaratory judgment against it.

3. Rarely Is It Fair To Let The Appellant Moot The Appeal And Eliminate Its Loss – Certainly, This Is Not Such A Case

a. OXY hid the case-mooting conduct from the Tenth Circuit

It is difficult to imagine a $1.4 billion deal would be initiated, negotiated, papered up, and executed in a few months. OXY knew its deal to sell all of its Kansas assets, including the leases, would moot its appeal, yet it proceeded with its appeal as if nothing had happened. The Tenth Circuit correctly observed that "OXY's apparent litigation strategy before our court [was] objectively consistent with an effort to secure an impermissible advisory opinion." App. 23a (citing cases

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commend it either; we are entirely phlegmatic regarding the sale." App. 25a.

in which the Tenth Circuit could have received such evidence). OXY tries to spin this lack of candor to the court and opposing counsel as a good thing, as if it could proceed on the merits without mentioning its case-mooting conduct. The Tenth Circuit was charitable in describing OXY's litigation conduct as "impermissible."

b. OXY hid the lease sale documents from the Tenth Circuit

If hiding the entire $1.4 billion deal was not enough, once Respondents revealed OXY's deal to the Tenth Circuit, OXY then hid the Merit Sale Contract from the Court. App. 23a n.8 (noting that "OXY [had] ample opportunity" to file its evidence on the subject). OXY did not bring the sale documents to oral argument, where the mootness and vacatur was to be argued. And "[d]espite repeated questions at oral argument, OXY never voluntarily offered for inclusion in the record the sales contract, or a part thereof." App. 23a. OXY never offered it when Merit tried to intervene, without admitting to be bound by the declaratory judgment. "Nor did OXY file a motion to substitute parties." App. 23a. If the Merit Sale Contract somehow warranted substitution, OXY would have known it – Respondents would not have. *But see* App. 38a (Judge Hartz's two paragraph dissent criticizing Plaintiff Class for not moving to substitute anyway and without recognizing Merit had taken no action to cut off the

supply of free, useable, house gas).[5] OXY did not offer the Contract after oral argument, after the first motion to reconsider (which was denied), or even after the second motion to reconsider (which was also denied).

By refusing to present the evidence that only it had, OXY failed to carry its burden to prove the equities favored vacatur. *Bancorp*, 513 U.S. at 26 ("It is [the appellant's] burden, as the party seeking relief from the status quo of the [lower court] judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur").[6]

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[5] Judge Hartz did not dissent in the initial opinion, only upon reconsideration. *Compare* App. 74a *with* App. 37a.

[6] Although OXY invokes *Munsingwear*, it is of no help. *United States v. Munsingwear, Inc*., 340 U.S. 36, 39 (1950). *Munsingwear* addresses mootness between a circuit court and this Court, where the circuit court decision may carry precedential value for an entire circuit, unlike a district court opinion which carries no precedential value. *See also Am. Family Life*, 129 F.3d at 631 (noting a federal agency decision may have some residual collateral value, and following *Munsingwear* as a result instead of *Bancorp*). Besides, *Munsingwear* long ago adopted the "happenstance" versus the knowing voluntary choice distinction that controls this case.

Here, because OXY sold all of its Kansas assets, including the leases at issue, the district court opinion could not be used for nonmutual collateral estoppel against OXY. But to the extent nonmutual collateral estoppel might be available sometime in the future, that availability is a positive public interest reason not to vacate the declaratory judgment against OXY. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 641 (1991).

4. There Is No Circuit Split

After *Bancorp*, all of the circuits follow the principal factor of voluntary case-mooting conduct in the equitable determination of vacatur. Both sides of OXY's so-called split (since there is not one) focus on whether the appellant "knew or should have known" (Second Circuit) or made a "conscious choice" (Third Circuit) regarding the appeal. *See* n.3, *supra*. If so, leaving the district court judgment in place is not unfair since the "judgment is not unreviewable, but simply unreviewed by the [appellant's] own choice." *Bancorp*, 513 U.S. at 24. That did not change after *Alvarez*. Although after *Alvarez*, some courts did look more critically at the voluntary conduct of governmental agencies, where one arm may not have known what the other arm was doing. Again, this case involves no governmental agency.

No circuit – none – has applied the subjective motivation analysis OXY conjures. Even if a circuit had applied it, this case would not be a good vehicle for determining a change in the law because, rather than present evidence on its motive, OXY hid the most important facts: the Merit Sale and the Merit Sale Contract. To this day, the sale agreement remains conspicuously absent from the record. One can only surmise why. No doubt, due diligence by OXY and Merit Energy would have discussed the on-going lawsuit and the on-going obligations that had arisen from it, *i.e.*, the obligation under the leases to provide free, useable, house gas. That is not something the sophisticated corporate lawyers on a $1.4 billion deal would have simply overlooked.

OXY cites pre-*Alvarez* cases and selectively quotes from *dicta* in an effort to gin up a conflict, but any conflict is illusory. Pet. 14-22. The split is supposed to be between: (a) the First, Second, Third, Seventh, Ninth, and D.C. Circuits[7] and (b) the Fourth, Tenth, and Federal Circuits.[8] Except for the Third Circuit's decision in *Lightner*, all of the (a) opinions predate *Alvarez*, while all of the (b) opinions post-date *Alvarez*.

The First Circuit case does not support OXY's position. *Kerkhof* noted that vacatur was in the "equitable discretion" of the circuit court and was allowed because the appellant believed it was legally obligated to do the mooting conduct. 282 F.3d at 54 (appellant "mooted the case unilaterally . . . but did so based on a perceived legal obligation under the ShareWorks Grant Plan"). OXY never claimed it was legally obligated to sell the Kansas assets such that the conduct might have been more akin to happenstance.

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[7] *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44 (1st Cir. 2002); *Russman v. Bd. of Educ.*, 260 F.3d 114 (2d Cir. 2001); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186 (3d Cir. 2001) (Alito, J.); *Lightner ex rel. NLRB v. 1621 Route 22 W. Operating Co.*, 729 F.3d 235 (3d Cir. 2013); *Local Union No. 34 v. Bazzano*, 43 F.3d 1474 (7th Cir. 1994) (unpublished); *Dilley v. Gunn*, 64 F.3d 1365 (9th Cir. 1995); *Am. Family Life Assur. Co. v. F.C.C.*, 129 F.3d 625 (D.C. Cir. 1997).

[8] *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010); *United States v. Springer*, 715 F.3d 535 (4th Cir. 2013); *Tafas v. Kappos*, 586 F.3d 1369 (Fed. Cir. 2009); *Tessera, Inc. v. Int'l Trade Comm'n*, 646 F.3d 1357 (Fed. Cir. 2011); and this case (2016).

The Second Circuit offers no help to OXY either, as shown above. *Russman* set out the test of "knew or should have known" the conduct would moot the case.[9] Again, OXY would lose under the Second Circuit's test.

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[9] Not listed is the Fifth Circuit, which ruled distinguishable the *dicta* in the Second Circuit's *Russman* case. App. 51a n.5 (discussing *Staley v. Harris Cty*., 485 F.3d 305, 312 (5th Cir. 2007) (en banc)). *Staley* distinguished *Russman* (2d Cir.), *Khodara* (3d Cir.), and *Nat'l Black Police* (D.C. Cir.) and *Dilley* (9th Cir).

> Here, for example, three equitable factors distinguish this case from *Russman*, and indeed, from the other cases that have applied the *Russman* approach, *see Khodara Envtl.*, 237 F.3d at 195; *Nat'l Black Police Assoc.*, 108 F.3d at 351-54; *cf. Dilley*, 64 F.3d at 1370-71 (remanding). First, in none of those cases did a party obtain full relief in the district court, and on appeal, before the opposing party took actions mooting the case. Second, in none of those cases did a party assert outright that its actions mooting the case were only temporary. And third, in those cases, the district court judgment had a greater effect on non-parties to the litigation. *See Russman*, 260 F.3d at 118 (district court held that the U.S. Constitution and New York law do not require on-site special education services at private parochial school); *Khodara Envtl.*, 237 F.3d at 191-92 (district court held federal statute facially unconstitutional); *Nat'l Black Police Assoc.*, 108 F.3d at 348 (district court held initiative limiting campaign contributions unconstitutional and enjoined enforcement); *Dilley*, 64 F.3d at 1367 (district court held that prison failed to provide inmates with constitutionally adequate access to the law library and ordered changes in the library's policies). Here, in contrast, this case is fact and party specific.
>
> Given these differences, the equities in the decisions of our sister circuits are different from the equities in this case. Accordingly, we are not creating a circuit split because, like the decisions of our sister circuits, we are

The Third, Ninth, and D.C. Circuits also come out contrary to OXY. *See* n.8, *supra*.[10] The Ninth Circuit in *Dilley* emphasized that the motivation behind the mooting conduct does not matter. Whether the mooting conduct was motivated as an effort to manipulate the appellate process and vacate the appeal, or just had that effect; either way, vacatur is inappropriate. *Dilley*, 64 F.3d at 1371-72. *Dilley* also addressed the usual governmental action context later found in *Alvarez* where the line between mooting an appeal and doing it knowingly can be the difference between "happenstance" (or case-mooting conduct unrelated to the appeal) and "voluntary conduct" (which prevents vacatur). *Id*. at 1372. OXY never argues that its deal to sell all of its Kansas leases was an unknowing happenstance. Given the disclosures, due diligence, and detail involved in a $1.4 billion sale, any such argument would be specious. The D.C. Circuit *American Family Life* case was another government entity case involving the F.C.C., where the court was concerned with the

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> deciding this case based on the facts and the equities before us.

Id. at 312-13 and n.4.

[10] In these governmental cases, where one arm of the government does not know about the actions of the other arm, the voluntary conduct is more akin to happenstance since the court can find that the federal case being mooted played no role in the voluntary mooting conduct, so that there is no need to weigh how "significant" that role is. Here, however, OXY knew it was impacting the appeal, but no evidence was presented on how significant that was. The party with the evidence (here, OXY) and the party who wanted affirmative judicial action (here, OXY) should present evidence to support its position. OXY did the opposite.

possible lingering precedential impact nationwide of a federal agency order. 129 F.3d at 631. The concerns in this case do not rise to that level.

The 1994 unpublished Seventh Circuit opinion in *Bazzano* does not help. It was decided shortly after *Bancorp* and interpreted *Bancorp* narrowly, as applying only to settlements between the parties, not to a settlement by one party that moots the action indirectly. In any event, the case holds no sway; no court has ever cited *Bazzano*.

Nor do the more recent post-*Alvarez* cases (supposedly on the other side of the conjured circuit split) help OXY. *See* n.9, *supra*. None fit OXY's context, and they do not show an actual split. The courts simply weighed the equitable facts presented in each different case and reached different conclusions based on those facts, just like the Tenth Circuit did in this case and this Court has done in *Bancorp* and *Alvarez*.

For instance, OXY cites the Fourth Circuit case of *Norfolk Railway v. City of Alexandria*, which is not contrary to the above cases. Vacatur was ordered because the mooting conduct was happenstance. The district court opinion was vacated only in part because the Fourth Circuit's own opinion (not that of the parties) mooted consideration of those issues. 608 F.3d at 161-62 ("Our decision on the ICCTA issue – that federal law preempts the Ordinance from being applied to Norfolk Southern through the Permit – moots the HMTA and FRSA issues pursued here."). Federal preemption is not at issue in this case.

The Federal Circuit case cited by OXY is also in line with the cases above. *Tessera*, 646 F.3d at 1371 ("It is apparent that this appeal became moot through happenstance, not of Tessera's voluntary actions.").

In sum, the Tenth Circuit faithfully followed the principal condition of a knowing or conscious case-mooting conduct standard that is evident in all of the above cases. OXY's sale of all of its Kansas assets, including the leases, was a knowing and conscious decision that mooted the case. Obviously, if the principal equitable factor is not satisfied, it is difficult to imagine how the total weighing of equities favors OXY. But the Tenth Circuit gave OXY another "bite at the apple" anyway to show compelling equitable reasons. OXY showed none, and devotes little effort to the "other compelling equity" concept.[11] Instead, OXY wants to

[11] Other cases have addressed this "other compelling equity" concept and found it requires a compelling public interest (which does not exist here). In *United States v. Springer*, the Fourth Circuit found in pure *dicta* that if appellant knowingly and voluntarily mooted his own appeal such that vacatur would have been common under *Bancorp*, *Alvarez*, and all of the cases cited above, it would not have been in the "public interest" to do so under the facts of *Springer*. 715 F.3d at 542-44 (dicta discussing vacatur and the "public interest" of a Constitutional right of due process and liberty being at stake), and 544 ("this matter is not moot"). OXY contends the Fourth Circuit "other compelling equity" focus on the "public interest" is misplaced. Pet. 19 (citing *Springer*). It is not. When appellant's voluntary action moots the appeal, "vacatur should not be granted unless doing so would serve the public interest." *Khodara*, 237 F.3d at 194 (Alito, J.) (citing *Bancorp*, 513 U.S. at 25-29). "Thus, absent unusual circumstances, the appellate vacatur decision under *Bancorp* is informed almost entirely, if not entirely, by the twin considerations of fault and public interest." *Khodara*, 237 F.3d at 194-95 (quoting *Valero Terrestrial Corp. v.*

turn away from the "knowing or conscious choice" test, to a nebulous "significant factor" motivation test. There is no circuit or other case support for that test, for good reason.

B. OXY Hopes To Replace The Easy To Determine "Knowing and Voluntary Conduct" Rule With A Difficult to Determine Subjective Motive-Weighing Test That Will Spawn Unnecessary Satellite Litigation

1. Circuit Courts Are Not Fact Finders

The vacatur test established by *Bancorp* and *Alvarez* is objective and simple. The conduct is either knowing and voluntary or it's not. The test does not require discovery into far afield matters of business or governmental policy, determining their legality or propriety, or even their motivations. The decision can generally be made without major factual inquiry into the case-mooting conduct. To change the test as OXY suggests – to weigh evidence rather than obvious equities based on evidence that is often not available, as this case illustrates – is to transform circuit courts into finders of fact, which is not their function.

Paige, 211 F.3d 112, 118 (4th Cir. 2000)) (denying vacatur). *See also Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451 (1st Cir. 2009) ("vacatur is appropriate only when it would serve the public interest"). Only $1.4 billion persuaded OXY to sell its Kansas assets. There are no public interest factors to consider, certainly not factors of Constitutional dimensions. Again, the "public interest" equity circumstances usually arise in government cases that do not exist here in a dispute between private parties.

2. District Courts Should Not Be Burdened With Satellite Litigation

Nor should the district courts be burdened with satellite litigation into the case-mooting conduct. While a circuit court, when faced with a moot appeal, could remand the case back to the district court for further discovery and findings of fact on the "significant motivation" of the mooting party, doing so would effectively force litigants to litigate a case within a case, with a whole new set of scheduling orders, discovery motions, and briefing. To create another lawsuit to resolve a lawsuit is contrary to Rule 1 of the Federal Rules of Civil Procedure and is bad policy.

3. The Parties Should Not Be Burdened With Satellite Litigation

Assuming the significant motivation test OXY proposes would apply to both voluntary case-mooting conduct of the appellee and appellant alike, both parties would have to engage in discovery. And it would be difficult discovery: proving the opposite of a party's alleged motivation is nearly impossible. Consider, for example, the years of litigation in anti-trust cases to determine the motivation of a party claiming its conduct was pro-competitive rather than anti-competitive. Or determining good faith, which is always a fact issue. Worse yet, the party hoping to change the outcome in the district court will hold all of the evidence, like OXY here.

In this case, OXY had all of the evidence regarding its case-mooting conduct, and even after oral argument when the Tenth Circuit essentially said, "where is the evidence?," OXY stonewalled. Had the shoe been on the other foot, OXY certainly would have wanted Respondents to lay their cards on the table and then take depositions, if necessary, to prove the opposite. So, instead of litigating over the conduct surrounding the threat to cut off house gas, the parties would have to embark on an entirely different lawsuit over the motivation of OXY entering into a deal with Merit Energy to discern, not just the primary motive, but a "significant" motive, whatever that is. OXY's new proposed test would doom litigants to years of unnecessary and time-consuming satellite litigation.

4. This Case Is Not A Good Vehicle To Change The Vacatur Law

The Tenth Circuit found: "we have no adequate means on this record to reach a firm conclusion regarding OXY's subjective purpose." App. 24a. So even if the vacatur law should be based on the subjective motivations of OXY, this record does not support any conclusion on that issue. Ultimately, this case is not a good vehicle for a petition for writ of certiorari to propose a change of the vacatur law based on motivation of the appellant in entering into case-mooting conduct, a $1.4 billion sale of assets.

CONCLUSION

Having failed to carry its burden on vacatur before the Tenth Circuit, OXY cannot do so in this Court. OXY's petition for a writ of certiorari should be denied. But, if granted, Respondents' conditional cross-petition for a writ of certiorari should be granted as well.

Respectfully submitted,

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AUGUST 2016